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CORPORATION and Counterdefendants GOLDEN
MEDIA GROUP, INC. and TIGA
ENTERTAINMENT COMPANY, LTD.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

UM CORPORATION, a Japanese
corporation,

Plaintiff,

v.

TSUBURAYA PRODUCTIONS CO.,
LTD., a Japanese corporation,

Defendant.

AND RELATED CROSS-CLAIMS

Case No. 2:15-cv-03764-AB (AJWx)

**PLAINTIFF AND
COUNTERDEFENDANT UM
CORPORATION'S STATEMENT OF
UNCONTROVERTED FACTS AND
CONCLUSIONS OF LAW IN
SUPPORT OF MOTION FOR
JUDGMENT [Fed. R. Civ. P. 56]**

Date: September 12, 2016
Time: 10:00 a.m.
Location: Courtroom 4

Motion Hrng. Cutoff: January 9, 2017
Pretrial Conf.: March 27, 2017
Trial: April 18, 2017

Pursuant to Local Rule 56-1, plaintiff and counterdefendant UM Corporation (“UMC”) hereby submits its Statement of Uncontroverted Facts and Conclusions of Law in support of its Motion for Summary Judgment.¹

I. STATEMENT OF UNCONTROVERTED FACTS

Statement of Uncontroverted Facts	Supporting Evidence
Introduction	
1. In this lawsuit, defendant and counterclaimant Tsuburaya Productions Co., Ltd. (“TPC”) claims that a 1976 agreement (the “1976 Agreement”) between TPC and counterdefendant Sompote Saengduenchai (“Mr. Sompote”) was forged and is therefore invalid, and that plaintiff and counterdefendant UM Corporation (“UMC”) therefore cannot rely on the 1976 Agreement as a basis for claiming that it owns intellectual property right in various works based on the superhero Ultraman.	Tsuburaya Productions Co., Ltd.’s Answer, Affirmative Defenses and Counterclaims filed September 11, 2015 [Dkt. 19], at 10 (Third, Tenth, and Eleventh Affirmative Defenses); <i>id.</i> at 12, 20-21, 24-26, ¶¶ 3, 32-33, 48, 53-54.
Preclusive Effect of Chinese and Japanese Judgments	
2. In 1997, TPC filed a lawsuit	Request for Judicial Notice (“RJN”), Ex.

¹ UMC has also moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) as to the affirmative defenses and counterclaims of defendant and counterclaimant Tsuburaya Productions Co., Ltd. that are predicated upon the contention that the 1976 Agreement was procured by fraud. In the event that the Court grants judgment on the pleadings, it need not consider Facts 2 through 22 of this Statement.

Statement of Uncontroverted Facts	Supporting Evidence
against Mr. Sompote in the Tokyo District Court.	B, at 4-5 (September 30, 2010 Tokyo District Court Judgment describing prior lawsuit).
3. In a February 28, 2003 Judgment, the Tokyo District Court held that the 1976 Agreement was genuine.	RJN, Ex. B, at 5 (September 30, 2010 Tokyo District Court Judgment describing prior lawsuit).
4. On December 10, 2003, the Tokyo Appellate Court agreed with the Tokyo District Court as to the authenticity of the 1976 Agreement.	RJN, Ex. B, at 5-6 (September 30, 2010 Tokyo District Court Judgment describing prior lawsuit).
5. On April 27, 2004, the Supreme Court of Japan declined to hear TPC's appeal.	RJN, Ex. B, at 6 (September 30, 2010 Tokyo District Court Judgment describing prior lawsuit).
6. In 1997, TPC sued Tsuburaya Chaiyo Company Limited ("Chaiyo"), Mr. Sompote, Perasit Saengduenchai ("Mr. Perasit"), and Book Athens Distribution Company Limited in Thailand.	Declaration of Jeffrey D. Wexler ("Wexler Decl."), Ex. B, at 1, 3 (unofficial translation of November 14, 2007 Thai Supreme Court Judgment). ²
7. In an April 4, 2000 decision, the Thai Central Intellectual Property and International Trade Court	Wexler Decl., Ex. B, at 2, 13-16 (unofficial translation of November 14, 2007 Thai Supreme Court Judgment).

² UMC has not sought judicial notice of the Thai Supreme Court's Judgment and does not vouch for the unofficial translation of that Judgment. UMC is providing that Judgment to the Court as background for the issues presented by this motion.

Statement of Uncontroverted Facts	Supporting Evidence
dismissed TPC's claim that the 1976 Agreement was forged.	
8. On November 14, 2007, the Thai Supreme Court reversed, accepting TPC's claim that the 1976 Agreement was forged.	Wexler Decl., Ex. B, at 31-40 (unofficial translation of November 14, 2007 Thai Supreme Court Judgment).
9. The Thai Supreme Court's Judgment did not refer to the 2003 Judgments of the Tokyo District Court and the Tokyo Appellate Court, let alone address the issue whether such Judgments should be given preclusive effect.	Wexler Decl., Ex. B (unofficial translation of November 14, 2007 Thai Supreme Court Judgment).
10. In 2009, Mr. Sompote filed a lawsuit against TPC in Tokyo District Court; UMC intervened in that lawsuit.	RJN, Ex. B, at 1 (September 30, 2010 Tokyo District Court Judgment).
11. On September 30, 2010, the Tokyo District Court issued a Judgment in which it held that TPC could not raise the forgery issue again because that issue had been resolved against TPC by the Tokyo Appellate Court in 2003.	RJN, Ex. B (September 30, 2010 Tokyo District Court Judgment).
12. The Tokyo District Court recognized that there had already	RJN, Ex. B, at 4-7 (September 30, 2010 Tokyo District Court Judgment); RJN,

Statement of Uncontroverted Facts	Supporting Evidence
been Judgments by courts in three different countries with regard to, <i>inter alia</i>, the claim that the 1976 Agreement was a forgery: (1) the 2003 Judgment by the Tokyo Appellate Court holding that the 1976 Agreement was not a forgery; (2) the 2007 Judgment by the Thai Supreme Court holding that the 1976 Agreement was a forgery; and (3) the September 16, 2009 Judgment of the Guangzhou Intermediate People's Court holding that the 1976 Agreement was a forgery. (As discussed below, the September 16, 2009 Judgment of the Guangzhou Intermediate People's Court was overruled by the Higher People's Court of Guangdong Province on October 25, 2010, one month after the Tokyo District Court's Judgment.)	Ex. H, at 16-19, 21-22 (September 29, 2013 Chinese Supreme People's Court Judgment).
13. The Tokyo District Court summarized the parties' briefing of the issue as to the effect of the prior Judgments, then held that the 2003 Tokyo litigation barred TPC from	RJN, Ex. B, at 13-16, 34-35, 42-44 (September 30, 2010 Tokyo District Court Judgment).

Statement of Uncontroverted Facts	Supporting Evidence
relitigating the issue of the validity of the 1976 Agreement.	
14. The Tokyo District Court explained that it was declining to follow the Thai Supreme Court's Judgment as contrary to the prior Japanese Judgments.	RJN, Ex. B, at 53-54 (September 30, 2010 Tokyo District Court Judgment)
15. On July 27, 2011, the Japanese Intellectual Property High Court filed a Judgment ruling on the appeals of TPC and UMC without addressing TPC's claim that the 1976 Agreement was forged (suggesting that TPC did not raise that argument on appeal).	RJN, Ex. D (July 27, 2011 Japanese Intellectual Property High Court Judgment).
16. On April 26, 2012, the Supreme Court of Japan declined to hear TPC's appeal from the Japanese Intellectual Property High Court's Judgment.	RJN, Ex. F (April 26, 2012 Supreme Court of Japan Judgment denying review).
17. On September 30, 2005, Mr. Sompote and Chaiyo filed suit in the Guangzhou Intermediate People's Court against TPC, Shanghai Tsuburaya Co., Ltd., Guangzhou Book Acquisition Center Co., Ltd., and Shanghai Audiovisual Press.	RJN, Ex. H, at 5 (September 29, 2013 Chinese Supreme People's Court Judgment).

Statement of Uncontroverted Facts	Supporting Evidence
18. In a September 16, 2009 Judgment, the Guangzhou Intermediate People's Court held that the 1976 Agreement was invalid and that Mr. Sompote and Chaiyo did not own rights to the copyrighted materials.	RJN, Ex. H, at 11-13 (September 29, 2013 Chinese Supreme People's Court Judgment).
19. In an October 25, 2010 Judgment, the Higher People's Court of Guangdong Province reversed the lower court's ruling, holding that the 1976 Agreement was authentic.	RJN, Ex. H, at 16-19, 21-22 (September 29, 2013 Chinese Supreme People's Court Judgment).
20. On September 29, 2013, the Chinese Supreme People's Court upheld the decision of the Higher People's Court of Guangdong Province.	RJN, Ex. H, at 22-26 (September 29, 2013 Chinese Supreme People's Court Judgment).
21. The Chinese Supreme People's Court affirmed the lower court's finding that TPC had failed to provide evidence to prove the claim that the 1976 Agreement was faked.	RJN, Ex. H, at 23-25 (September 29, 2013 Chinese Supreme People's Court Judgment).
22. The Chinese Supreme People's Court rejected TPC's argument that it should afford preclusive effect to the 2007 Judgment of the Supreme Court	RJN, Ex. H, at 7-9, 25 (September 29, 2013 Chinese Supreme People's Court Judgment).

Statement of Uncontroverted Facts	Supporting Evidence
of Thailand on the ground that TPC had failed to apply to the Chinese Intermediate People’s Court for recognition of that Judgment, as it was required to do under Articles 281 and 282 of the Civil Procedure Law of China for the Chinese courts to consider that Judgment.	
Purported Termination of 1976 Agreement	
23. On July 10, 2014, Shinichi Ooka of TPC sent a letter to Mr. Perasit stating that TPC “hereby notif[ies] both you and UM[C] that [TPC] is effectively terminating the 1976 Agreement by service of this letter under Article 597, Section 3 of the Civil Code of Japan (if there is any compensation for such rights, under Article 617, Section 1 thereof) as the 1976 License Agreement has an indefinite term.”	Wexler Decl., Ex. C.
24. Mr. Ooka also sent a letter to Mr. Sompote purporting to terminate the 1976 Agreement.	Wexler Decl., Ex. D.

II. CONCLUSIONS OF LAW

1. “Rule 12(c) is ‘functionally identical’ to Rule 12(b)(6).” *U.S. ex rel. Cafasso v. General Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 n. 4 (9th Cir. 2011) (quoting *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989)).

2. Thus, “[a]nalysis under Rule 12(c) is ‘substantially identical’ to analysis under Rule 12(b)(6).” *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012).

3. However, “[a] Rule 12(c) motion differs from a Rule 12(b)(6) motion in that it implicates the pleadings as a whole.” 2 W. Schwarzer, A. Tashima & J. Wagstaffe, *California Practice Guide: Federal Civil Procedure Before Trial*, § 9:321.1, at 9-122 (2016) (quoting *Ibanez v. U.S. Bank Nat’l Ass’n*, 856 F. Supp. 2d 273, 275 (D. Mass. 2012)).

4. Documents attached to the complaint and incorporated by reference are treated as part of the complaint for purposes of a Rule 12(b)(6) motion. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988, *amended on other grounds*, 275 F.3d 1187 (9th Cir. 2001).

5. Similarly, in ruling on a Rule 12 motion to dismiss, the Court may consider documents referenced in the complaint, even though they are not attached thereto. *See, e.g., No. 84 Employer – Teamster Joint Council Pension Trust Fund v. America West Holding Corp.*, 320 F.3d 920, 925 n. 2 (9th Cir. 2003) (“[u]nder the incorporation by reference doctrine, we also consider documents submitted by Defendants that were referenced in the complaint and whose authenticity has not been questioned”); *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994) (same), *overruled on other grounds*, *Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).

6. Here, the 1976 Agreement may properly be considered on a Rule 12 motion because it is referenced repeatedly in TPC’s Answer/Counterclaims, and

1 there is no dispute that the 1976 Agreement is an authentic copy of the document
2 that TPC contends to be a forgery. *See* Dkt. 19 at 10 (Third & Eleventh
3 Affirmative Defenses); *id.* at 12, 20-21, 25, ¶¶ 3, 32-35, 53; *id.* at 26, prayer, ¶ 3.

4 7. Furthermore, extrinsic evidence that is subject to judicial notice may
5 be properly considered on a Rule 12(c) motion. *See Heliotrope Gen., Inc. v. Ford*
6 *Motor Co.*, 189 F.3d 971, 981 n. 18 (9th Cir. 1999).

7 8. “Court orders and filings are the type of documents that are properly
8 noticed under [Rule 201(b)].” *Neilson v. Union Bank of Cal.*, 290 F. Supp. 2d
9 1101, 1113 (C.D. Cal. 2003).

10 9. Thus, courts ““may take notice of proceedings in other courts, both
11 within and without the federal judicial system, if those proceedings have a direct
12 relation to matters at issue.”” *United States ex rel. Robinson Rancheria Citizens*
13 *Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (quoting *St. Louis*
14 *Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th Cir. 1979)).

15 10. A party may bring a Rule 12(c) motion for judgment on the pleadings
16 based upon *res judicata*. *See Owens v. Kaiser Foundation Health Plan, Inc.*, 244
17 F.3d 708, 713-15 (9th Cir. 2001); *Clark v. Yosemite Community College Dist.*, 785
18 F.2d 781, 784 (9th Cir. 1986).

19 11. When determining whether the results of prior litigation preclude a
20 claim, the Court may take judicial notice of materials from the prior litigation. *See,*
21 *e.g., Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 & n. 6 (9th Cir.
22 2006) (taking judicial notice of briefs and hearing transcript to identify the issues
23 that had been litigated and settled in prior litigation, for purposes of issue
24 preclusion); *United States ex rel. Robinson Rancheria Citizens Council*, 971 F.2d
25 at 248 (taking judicial notice of state court judgment in affirming dismissal of
26 complaint based on *res judicata*).

1 12. Summary judgment is required “if the movant shows that there is no
2 genuine issue as to any material fact and the movant is entitled to judgment as a
3 matter of law.” Fed. R. Civ. P. 56(a).

4 13. The non-movant must identify specific facts that show a genuine issue
5 of material fact for trial, *i.e.*, that the facts could allow a reasonable jury to return a
6 verdict for the non-movant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
7 248 (1986).

8 14. Although the Full Faith and Credit Clause of the United States
9 Constitution does not apply to judgments of foreign courts, courts in the United
10 States afford preclusive effect to the judgments of foreign courts by relying upon
11 the doctrine of international comity. *See, e.g., Pony Express Records v.*
12 *Springsteen*, 163 F. Supp. 2d 465, 471-72 (D.N.J. 2001).

13 15. International comity ““is the recognition which one nation allows
14 within its territory to the legislative, executive or judicial acts of another nation,
15 having due regard both to international duty and convenience, and to the rights of
16 its own citizens or of other persons who are under the protection of its laws.””
17 *Mujica v. AirScan Inc.*, 771 F.3d 580, 597-98 (9th Cir. 2014) (quoting *In re Simon*,
18 153 F.3d 991, 998 (9th Cir. 1998) (quoting *Hilton v. Guyot*, 159 U.S. 113, 164
19 (1895))).

20 16. “Comity is a ‘rule of “practice, convenience, and expediency” rather
21 than of law’ that courts have embraced ‘to promote cooperation and reciprocity
22 with foreign lands.’” *Id.* at 598 (quoting *Pravin Banker Assocs., Ltd. v. Banco*
23 *Popular del Peru*, 109 F.3d 850, 854 (2d Cir. 1997) (quoting *Somportex Ltd. v.*
24 *Phila. Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971))).

25 17. When applying comity to preclude a party from relitigating claims
26 already decided in another country, a court must determine that doing so would be
27 fair. “As a general rule, comity may be granted where ‘it is shown that the foreign
28 court is a court of competent jurisdiction, and that the laws and public policy of the

1 forum state and the rights of its residents will not be violated.”” *International*
2 *Nutrition Co. v. Horphag Research Ltd.*, 257 F.3d 1324, 1329 (Fed. Cir. 2001)
3 (quoting *Cunard S.S. Co. v. Salen Reefer Serv. AB*, 773 F.2d 452, 457 (2d Cir.
4 1985)).

5 18. Indeed, “as long as the foreign court abides by ‘fundamental standards
6 of procedural fairness,’ granting comity is appropriate.” *Id.* (quoting *Cunard S.S.*
7 *Co.*, 773 F.2d at 457). *See Hilton*, 159 U.S. at 159-60 (deference to a foreign
8 judgment on comity principles is generally appropriate where the foreign court had
9 personal and subject-matter jurisdiction, the parties were informed of and had the
10 opportunity to defend against the claim, and there is a record; in such case, “the
11 judgment is prima facie evidence, at least, of the truth of the matter adjudged; and
12 it should be held conclusive upon the merits tried in the foreign court”).

13 19. “‘It has long been the law that unless a foreign country’s judgments
14 are the result of outrageous departures from our own notions of ‘civilized
15 jurisprudence,’ comity should not be refused.’” *Ohno v. Yasuma*, 723 F.3d 984,
16 1003 (9th Cir. 2013) (quoting *British Midland Airways Ltd. v. Int’l Travel, Inc.*, 497
17 F.2d 869, 871 (9th Cir. 1974) (quoting *Hilton*, 159 U.S. at 205)).

18 20. “‘Foreign-law notions are not per se disharmonious with due process
19 by reason of their divergence from the common-law notions of procedure.’”
20 *Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997) (quoting *Panama*
21 *Processes, S.A. v. Cities Serv. Co.*, 796 P.2d 276, 286 n. 36 (Okla. 1990)).

22 21. Of course, as with any system of jurisprudence, there are differences
23 between the law applied by courts in China and Japan and that applied by
24 American courts. There is, however, no basis for contending that such differences
25 are so extreme as to constitute “outrageous departures” from “civilized
26 jurisprudence.” *Ohno*, 723 F.3d at 1003.

27 22. Importantly, “[f]oreign judgments are not to be ‘tried afresh’ in U.S.
28 courts, applying domestic concepts.” *Id.* (citing *Hilton*, 159 U.S. at 202-03).

23. “We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.” *Id.* (quoting *Loucks ex rel. Loucks v. Standard Oil Co. of N.Y.*, 224 N.Y. 99, 111, 120 N.E. 198 (1918) (Cardozo, J.)).

24. To the contrary, “simple inconsistency between American state or federal law and foreign law . . . does not render a foreign judgment unenforceable by reason of repugnancy.” *Ohno*, 723 F.3d at 1003 (citing *Yahoo! Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 433 F.3d 1199, 1215 (9th Cir. 2006) (en banc) (per curiam) (plurality opinion)).

25. Thus, “[i]f American law recognizes generally parallel causes of action, the foreign cause of action cannot be said to be repugnant to American public policy.” *Id.* at 1005 (footnote omitted).

26. Here, the issues ruled on by the courts in China and Japan – *i.e.*, claims of copyright infringement and breach of contract and the defense of unenforceability of the 1976 Agreement due to alleged forgery – are the same claims asserted by the parties to this action; it is therefore beyond dispute that American law recognizes causes of action that are generally parallel to those considered and decided by the Chinese and Japanese courts.

27. United States courts have routinely barred relitigation of contractual issues properly decided by a foreign court. *See Pony Express Records*, 163 F. Supp. 2d at 473 (holding that a British court’s judgment on a claim that a contract transferred copyrights estopped the plaintiff from arguing to the contrary to support a claim of copyright infringement); *In-Tech Mktg. Inc. v. Hasbro, Inc.*, 719 F. Supp. 312, 317 (D.N.J. 1989) (applying principles of comity and collateral estoppel to prevent plaintiffs from relitigating a Dutch court’s ruling on the issue whether a patent assignment had been dissolved); *Fairchild, Arabatzis & Smith, Inc. v. Prometco Co.*, 470 F. Supp. 610, 617 (S.D.N.Y. 1979) (applying res

1 judicata to a British court’s finding of a valid and binding contract, free from
2 fraud).

3 28. Courts must also ensure that applying comity principles would not be
4 prejudicial to the interests of the United States. *See Wilson*, 127 F.3d at 809 (“[a]s
5 a general policy, ‘[c]omity should be withheld only when its acceptance would be
6 contrary or prejudicial to the interest of the nation called upon to give it effect’”) (quoting *Somportex Ltd.*, 453 F.2d at 440).

7
8 29. Under the last-in-time rule, “[i]f two or more courts render
9 inconsistent judgments on the same claim or issue, a subsequent court is normally
10 bound to follow the most recent determination that satisfies the requirements of *res*
11 *judicata*.” *Robi v. Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir. 1988). *See, e.g.,*
12 *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 74-78 (1939) (holding that
13 conclusive effect must be given to the last in time of two inconsistent judgments);
14 *Valley Nat’l Bank of Arizona v. A.E. Rouse & Co.*, 121 F.3d 1332, 1335 (9th Cir.
15 1997) (“[w]hen a court is faced with inconsistent judgments, ‘it should give *res*
16 *judicata* effect to the *last* previous judgment entered’”) (quoting *Robi*, 838 F.2d at
17 328); *Americana Fabrics, Inc. v. L & L Textiles, Inc.*, 754 F.2d 1524, 1529-30 (9th
18 Cir. 1985) (same); Restatement (Second) of Judgments § 15 (1982) (“[w]hen in
19 two actions inconsistent final judgments are rendered, it is the later, not the earlier,
20 judgment that is accorded conclusive effect in a third action under the rules of *res*
21 *judicata*”). *See generally* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice*
22 *& Procedure: Jurisdiction.2d*, § 4404, at 60-75 (2002 & supp. 2015).

23 30. As the Ninth Circuit explained in *Americana Fabrics, Inc.*:

24 When the same claim or issue is litigated in two courts, the
25 second court to reach judgment should give *res judicata* effect to the
26 judgment of the first, regardless of the order in which the two actions
27 were filed. . . . Sometimes, however, the second court does not give
28 preclusive effect to the judgment of the first court. This can occur
 when *res judicata* is not asserted in the second court, or when the
 second court decides, rightly or wrongly, that the doctrine does not
 apply. Should the claim or issue then come before a third court, as it
 did before the Central District in this case, that court is faced with

1 conflicting judgments from the first two courts. The governing rule to
2 be applied is quite clear. ***The third court should give res judicata***
effect to the last previous judgment entered.

3 *Americana Fabrics, Inc.*, 754 F.2d at 1529-30 (emphasis added). *See id.* at 1530 n.
4 2 (“[t]he rule is equally applicable when there are three or more prior inconsistent
5 proceedings”).

6 31. “[T]he last in time rule is supported by the rationale that it ““end[s]
7 the chain of relitigation . . . by stopping it where it [stands]” after entry of the
8 [most recent] court’s judgment, and thereby discourages relitigation in [yet
9 another] court.” *Robi*, 838 F.2d at 323 (quoting *Americana Fabrics, Inc.*, 754
10 F.2d at 1530).

11 32. “[E]ven when we think that the most recent judgment might be wrong,
12 we still give it *res judicata* effect so that finality is achieved and the parties are
13 encouraged to appeal an inconsistent judgment directly rather than attack it
14 collaterally before another court.” *Id.* *See Americana Fabrics, Inc.*, 754 F.2d at
15 1530 (“[t]he decision is not binding because it is correct; it is binding because it is
16 last”).

17 33. “[T]he later of the two inconsistent judgments is ordinarily held
18 conclusive in a third action even when the earlier judgment was relied on in the
19 second action and the court erroneously held that it was not conclusive.”
20 Restatement (Second) of Judgments § 15, cmt. n (1982).

21 34. The last-in-time rule applies to both claim preclusion and issue
22 preclusion. *See Americana Fabrics, Inc.*, 754 F.2d at 1530 (the prior “order has
23 both a claim-preclusive and issue-preclusive effect on the action in the district
24 court”); Restatement (Second) of Judgments § 15 cmt. c (1982) (“[t]he rule stated
25 in this Section governs the effect of a judgment by way of merger, bar, or issue
26 preclusion”).

27 35. The last-in-time rule applies regardless of the jurisdiction rendering
28 the judgment. *See Americana Fabrics, Inc.*, 754 F.2d at 1530 n. 2 (last-in-time

1 rule applies to both federal and state judgments); *Koehler v. Bank of Bermuda Ltd.*,
2 2004 WL 444101, *18 (S.D.N.Y. Mar. 10, 2014) (“[t]he latest in time rule applies
3 to foreign judgments”).

4 36. The last-in-time rule applies under both federal and California *res*
5 *judicata* law. *See Americana Fabrics, Inc.*, 754 F.2d at 1530 n. 2 (“[w]e need not
6 reach the issue of whether federal, California, or New York *res judicata* rules apply
7 to this case” because “[t]he ‘last in time’ rule is present in California and New
8 York law as well as in federal law”).

9 37. Here, the last-in-time rule applies to preclude TPC from relitigating its
10 claim of forgery. The most recent court to rule on the issue whether the 1976
11 Agreement is a forgery – the Supreme People’s Court of the People’s Republic of
12 China – found that the 1976 Agreement was not forged, as did the immediately
13 prior court to consider that issue, the Tokyo District Court. Either such
14 determination is sufficient to bar TPC from relitigating the issue of forgery before
15 this Court.

16 38. A rationale for affording preclusive effect to the last-in-time court’s
17 judgment is that such court “could have or did consider the *res judicata* effect of
18 earlier cases.” *Robi*, 838 F.2d at 328 (citing *Americana Fabrics, Inc.*, 754 F.2d at
19 1530).

20 39. “[I]f one party could have raised *res judicata*, but did not, that litigant
21 must bear the cost of its tactic or inadvertence.” *Id.* at 322-23 (citing 18 C. Wright,
22 A. Miller & E. Cooper, *Federal Practice & Procedure: Jurisdiction*, § 4404, at 26-
23 27 (1981)).

24 40. As the Chinese Supreme People’s Court stated, the Chinese courts
25 could have considered the preclusive effect of the Japanese or Thai Judgments, had
26 the parties followed the law allowing them to apply to the intermediate court for
27 recognition of foreign judgments. *See* RJN, Ex. H, at 7-9, 25 (discussing Civil
28 Procedure Law of the People’s Republic of China, Arts. 281, 282 (2012), which

1 allow a party to directly apply to the intermediate people's court for recognition of
2 a judgment, and authorize that court to recognize the validity of the judgment upon
3 making certain findings).

4 41. However, no party requested recognition of any prior Judgment in the
5 Chinese intermediate court. Where *res judicata* is not properly presented to the
6 last-in-time court, that court's judgment is nonetheless entitled to preclusive effect.
7 See 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure:*
8 *Jurisdiction.2d*, § 4404, at 62-63 (2002 & supp. 2015) (where a party has
9 inadvertently or intentionally failed to present the issue of *res judicata* to a court, it
10 is fair to preclude a third bite at the apple; "[a]lthough somewhat diluted, the
11 values of repose also suggest that it is better to rest after the second judgment").

12 42. Furthermore, "the most recent court to decide the matter may have
13 considered and rejected the operation of the prior judgment as *res judicata*, and its
14 decision should be treated as *res judicata* on the preclusive effect of the prior
15 judgment." *Robi*, 838 F.2d at 323 (citing *Americana Fabrics, Inc.*, 754 F.2d at
16 1530).

17 43. Here, the Japanese courts did consider and reject the operation of
18 foreign judgments as *res judicata*. In its September 30, 2010 Judgment, the Tokyo
19 District Court specifically considered the Judgments from the prior proceedings in
20 Japan, Thailand, and China, and concluded that the December 10, 2003 Judgment
21 of the Tokyo Appellate Court precluded TPC from relitigating the forgery claim.

22 44. The China Supreme Court's September 29, 2013 Civil Ruling is
23 entitled to preclusive effect because it is the last-in-time judgment. Accordingly,
24 such Court's holding bars all of TPC's claims to the extent that they are predicated
25 upon the contention that the 1976 Agreement is forged or unenforceable.
26 However, even if the Court were to decline to give preclusive effect to the Chinese
27 Supreme People's Court's Judgment, the September 30, 2010 Judgment of the
28

1 Tokyo District Court would bar all of TPC's claims based upon the alleged forgery
2 or unenforceability of the 1976 Agreement.

3 45. There is a split in authority as to whether a federal court giving
4 preclusive effect to the judgment of a foreign court should apply the preclusion law
5 of the foreign jurisdiction or U.S. preclusion law. *See, e.g., Alfadda v. Fenn*, 966
6 F. Supp. 1317, 1326-30 (S.D.N.Y. 1997) (summarizing split in law, then
7 "conclud[ing] that a federal court should normally apply either federal or state law,
8 depending on the nature of the claim, to determine the preclusive effect of a
9 foreign country judgment") (footnote omitted). The Court need not resolve this
10 issue on this motion because under either foreign or U.S. law, either or both the
11 Judgments of the Chinese Supreme People's Court and the Tokyo District Court
12 would be given preclusive effect against TPC's allegations that the 1976
13 Agreement is forged or unenforceable.

14 46. Because the Chinese Supreme People's Court's opinion indicated that
15 TPC could have sought preclusive effect for the Thai Supreme Court's Judgment
16 had it applied to the intermediate court for recognition of that judgment, it follows
17 that the courts of China will give preclusive effect to judgments where a party has
18 followed the proper procedures for requesting preclusive effect.

19 47. Because the Tokyo District Court's September 30, 2010 Judgment
20 afforded preclusive effect to the Tokyo Appellate Court's December 10, 2003
21 Judgment (and specifically declined to afford preclusive effect to the November
22 14, 2007 Judgment of the Thai Supreme Court and the subsequently overruled
23 October 23, 2009 Judgment of the Guangzhou Intermediate People's Court
24 because of the preclusive effect of the Tokyo Appellate Court's December 10,
25 2003 Judgment), it follows that Japanese courts would afford preclusive effect to
26 the September 30, 2010 Judgment of the Tokyo District Court.

27 48. If the Court were to apply U.S. law on *res judicata*, UMC would still
28 prevail. "According to the [Supreme] Court, '[t]he preclusive effect of a judgment

1 is defined by claim preclusion and issue preclusion, which are collectively referred
2 to as “res judicata.”” *White v. City of Pasadena*, 671 F.3d 918, 926 (9th Cir. 2012)
3 (quoting *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008)).

4 49. “[C]laim preclusion’ is the doctrine providing that ‘a final judgment
5 forecloses successive litigation of the very same claim, whether or not relitigation
6 of the claim raises the same issues as the earlier suit.’” *Id.* (quoting *Taylor*, 553
7 U.S. at 892).

8 50. “‘Issue preclusion, in contrast, bars successive litigation of an issue of
9 fact or law actually litigated and resolved in a valid court determination essential to
10 the prior judgment, even if the issue recurs in the context of a different claim.’” *Id.*
11 at 926-27 (quoting *Taylor*, 553 U.S. at 892).

12 51. “By ‘preclud[ing] parties from contesting matters that they have had a
13 full and fair opportunity to litigate,’ these two doctrines protect against ‘the
14 expense and vexation attending multiple lawsuits, conserv[e] judicial resources,
15 and foste[r] reliance on judicial action by minimizing the possibility of inconsistent
16 decisions.’” *Taylor*, 553 U.S. at 892 (quoting *Montana v. United States*, 440 U.S.
17 147, 153-54 (1979)).

18 52. Under federal law, “[i]ssue preclusion bars relitigation of issues
19 adjudicated in an earlier proceeding if three requirements are met: [] (1) the issue
20 necessarily decided at the previous proceeding is identical to the one which is
21 sought to be relitigated; [] (2) the first proceeding ended with a final judgment on
22 the merits; and [] (3) the party against whom [issue preclusion] is asserted was a
23 party or in privity with a party at the first proceeding.” *In re Reynoso*, 477 F.3d
24 1117, 1122 (9th Cir. 2007) (citing *Reyn’s Pasta Bella, LLC*, 442 F.3d at 746).

25 53. California’s law of issue preclusion is largely the same. Under
26 California law, “the doctrine of issue preclusion ‘precludes relitigation of issues
27 argued and decided in prior proceedings,’ when six criteria are met. . . . These
28 criteria are: (1) ‘the issue sought to be precluded from relitigation must be identical

1 to that decided in a former proceeding’; (2) the issue to be precluded ‘must have
2 been actually litigated in the former proceeding’; (3) the issue to be precluded
3 ‘must have been necessarily decided in the former proceeding’; (4) ‘the decision in
4 the former proceeding must be final and on the merits’; (5) ‘the party against
5 whom preclusion is sought must be the same as, or in privity with, the party to the
6 former proceeding’; and (6) application of issue preclusion must be consistent with
7 the public policies of ‘preservation of the integrity of the judicial system,
8 promotion of judicial economy, and protection of litigants from harassment by
9 vexatious litigation.’” *White*, 671 F.3d at 927 (quoting *Lucido v. Superior Court*,
10 51 Cal. 3d 335, 341-43 (1990)).

11 54. The elements set forth in this six-factor state law test are the same as
12 those set forth in the three-factor federal law test, except for the requirement that
13 the issue to be precluded must have been actually litigated (and not just necessarily
14 decided) in the prior litigation. Because the issues of alleged forgery and
15 unenforceability of the 1976 Agreement were addressed at length in the September
16 29, 2013 Judgment of the Chinese Supreme People’s Court and the September 30,
17 2010 Judgment of the Tokyo District Court, those issues were actually litigated in
18 the proceedings in China and Japan.

19 55. All three requirements of the federal test are satisfied here with regard
20 to both the 2013 Judgment of the Chinese Supreme People’s Court and the 2010
21 Judgment of the Tokyo District Court.

22 56. First, the issues of alleged forgery and unenforceability asserted by
23 TPC in this lawsuit are identical to the issues necessarily decided by both
24 judgments.

25 57. Second, both proceedings ended with final judgments on the merits,
26 with: (1) the Japanese Supreme Court having denied review on April 26, 2012 of
27 TPC’s appeal from the July 11, 2011 Judgment of the Japanese Intellectual
28 Property High Court affirming the September 30, 2010 Judgment of the Tokyo

1 District Court; and (2) the Chinese Supreme People’s Court – the court of last
2 resort – having ruled against TPC on this issue.

3 58. Third, TPC – the party against which issue preclusion is sought in this
4 case – was a party to both proceedings.

5 59. Under either federal or California law, the 2013 Judgment of the
6 Chinese Supreme People’s Court and/or the 2010 Judgment of the Tokyo District
7 Court bar TPC, as a matter of issue preclusion, from relitigating its claims that the
8 1976 Agreement was forged.

9 60. TPC’s Eleventh Affirmative Defense does not allege the legal or
10 factual basis for TPC’s contention that the 1976 Agreement is invalid under
11 Japanese law. However, because TPC has already litigated (and lost) the issue of
12 validity of the 1976 Agreement, issue preclusion bars it from challenging the
13 validity of that Agreement even if the challenge is based on a somewhat different
14 theory. *See Kamilche Co. v. United States*, 53 F.3d 1059, 1062-63 (9th Cir. 1995)
15 (rejecting United States’ argument that it was not collaterally estopped from
16 litigating issue of adverse possession to prove land ownership because in the prior
17 lawsuit it had relied on land title – not adverse possession – to prove ownership;
18 “‘once an *issue* is raised and determined, it is the entire *issue* that is precluded, not
19 just the particular arguments raised in support of it in the first case’”) (quoting
20 *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992)),
21 *amended*, 75 F.3d 1391 (9th Cir. 1996); *Applied Medical Resources Corp. v. U.S.*
22 *Surgical Corp.*, 352 F. Supp. 2d 1119, 1123-27 (C.D. Cal. 2005) (defendant who
23 unsuccessfully brought claim of patent invalidity in first lawsuit based on certain
24 grounds was precluded from relying on other grounds for invalidity in second
25 lawsuit); Restatement (Second) of Judgments § 27, cmt. c (1982) (“if the party
26 against whom preclusion is sought did in fact litigate an issue . . . and suffered an
27 adverse determination, . . . new arguments may not be presented to obtain a
28 different determination of that issue”).

1 61. In its July 10, 2014 letter to Mr. Perasit, TPC purported to terminate
2 the 1976 Agreement pursuant to Article 597, Section 3 of the Civil Code of Japan
3 (and if there is any compensation for the rights, pursuant to Article 617, Section 1
4 of that Code). On their face, however, neither provision applies to the Agreement,
5 a contract that transfers intellectual property rights.

6 62. First, Article 597, Section 3 applies to demands for the return of
7 “borrowed Things.” *See* Civil Code of Japan, Article 597 (Timing of Return of
8 Borrowed Things), Section 3 (“[i]f the parties have not specified the timing of the
9 return and the purposes of the using and taking profits, the lender may demand the
10 return of the ***borrowed Things*** at any time”) (emphasis added).

11 63. Because the term “Things” refers to “tangible thing[s],” *see* Civil
12 Code of Japan, Article 85, Article 597 has no applicability to assignments of or
13 licenses for intellectual property, an intangible asset.

14 64. Furthermore, Article 597 is part of Part III (Claims), Chapter 2
15 (Contracts), Section 6 (Loans for Use). Section 6 applies only when a party has
16 gratuitously received a “Thing” from the other party. *See* Civil Code of Japan,
17 Article 593 (“[a] loan for use shall become effective when one of the parties
18 receives a defined Thing from the other party by promising that he/she will return
19 the Thing after he/she has ***gratuitously*** made use of and taken the profits of the
20 same”) (emphasis added).

21 65. In the September 30, 2010 Judgment, the Tokyo District Court held
22 that the 1976 Agreement “was written to replace [TPC’s] debt by granting the
23 exclusive exploitation rights to [Mr. Sompote].” Issue preclusion bars TPC from
24 contending that the 1976 Agreement was gratuitous.

25 66. Second, Article 617, Section 1 applies to the termination of leases.
26 *See* Civil Code of Japan, Article 617, Section 1.

27 67. Article 617 is part of Part III (Claims), Section 7 (Leases). Under
28 Section 7, a “lease” requires a “Thing.” *See* Civil Code of Japan, Article 601 (“[a]

1 lease shall become effective when one of the parties promises to make a certain
2 **Thing** available for the using and taking of the profits by the other party and the
3 other party promises to pay rent for the same”) (emphasis added).

4 68. As stated above, the term “Thing” refers to a tangible thing. *See* Civil
5 Code of Japan, Article 85.

6 69. Furthermore, Article 617, Section 1 makes it clear that the provision
7 applies to leases of land and other tangible property, not to assignments of or
8 licenses for intellectual property, by referring solely to real property and other
9 tangible things in stating when terminated leases expire. *See* Article 617 (Offers to
10 Terminate Leases with Indefinite Terms), Section 1 (“[i]f the parties do not specify
11 the term of a lease, either party may request to terminate it at any time. In such
12 cases, the leases listed in the following items shall terminate on the expiration of
13 the respective periods from the day of the request to terminate prescribed
14 respectively in those items: (i) [l]eases of land: one year; (ii) [l]eases of buildings:
15 three months; and (iii) [l]eases of movables and seating hire facilities: one day”).

16 70. Any conclusion of law deemed to be a finding of fact is hereby
17 incorporated into the findings of fact.

18
19 Dated: September __, 2016

20 _____
21 Honorable Andre Birotte Jr.
22 Judge, United States District Court
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27
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1 Dated: July 25, 2016

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